# In the Supreme Court of the United States

OCTOBER TERM, 1965

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No. 275

MORTON SALT COMPANY, APPELLANT

*v.*

UNITED STATES OF AMERICA

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No. 276

DIAMOND CRYSTAL SALT COMPANY, APPELLANT

*v.*

UNITED STATES OF AMERICA

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*ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA, FOURTH DIVISION*

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## MOTION TO AFFIRM

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Pursuant to Rule 16, Paragraph 1(c), of the Rules of this Court, the United States moves that the judgment of the district court be affirmed.

### STATEMENT

This is a direct appeal in a civil action in which the district court held that appellants Morton Salt Company ("Morton") and Diamond Crystal Salt Company ("Diamond") violated Section 1 of the



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Sherman Act, 15 U.S.C. 1, by fixing the price of rock salt sold to public authorities under sealed bids (M. J.S. A–1—A–17).[1] Defendants were enjoined from fixing prices or exchanging the kind of information that had been instrumental in effectuating the price-fixing conspiracy (M. J.S. A–18—A–23).

### 1. THE HISTORY OF THE LITIGATION

This civil case was brought as a companion proceeding to a criminal action charging the same offense (M. J.S. A–12). In both cases the defendants were International Salt Co. ("International"), Morton, Diamond and Carey Salt Company ("Carey") (M. J.S. A–4, A–12—A–13). International, Morton and Diamond are, respectively, the first, second and third largest producers of rock salt in the United States (Tr. 1004), and they account for 85 to 90 percent of the national and midwestern rock salt markets (M. J.S. A–14—A–15). Carey is a producer of rock salt with mines in the Kansas producing field (M. J.S. A–14). Named as co-conspirators but not as defendants in both cases were (1) Cutler-Magner Company ("Cutler"), of Duluth, Minnesota, an independent distributor for Morton; and (2) Cargill Corporation ("Cargill") of Minneapolis, Minnesota, an independent distributor for Diamond (M. J.S. A–4). In the criminal case Carey pleaded *nolo contendere,* and the other

[1] "M. J.S." refers to the jurisdictional statement filed by Morton. "D. J.S." refers to Diamond's jurisdictional statement. "Tr." refers to the transcript of testimony in an earlier criminal case, adopted as the record in the present case by stipulation.

defendants were acquitted by a jury (M. J.S. A–12). In the civil case a consent decree was entered against both Carey and International, leaving the case to be tried only as to Morton and Diamond (M. J.S. A–12—A–13). The parties agreed to submit the case to the trial court on the record made at the criminal trial, together with two interrogatories and defendants' responses thereto (M. J.S. A–13).

## 2. THE FACTS

Rock salt is mined in five principal sections of the country—Louisiana, Kansas, Michigan, Ohio and New York (M. J.S. A–14)—and sold to government authorities principally for use as a deicing agent in removing snow and ice from roads and highways (Tr. 628–629). Sales to such authorities are generally made under sealed bids (Tr. 629). The purpose of the sealed-bid procedure is to secure the price advantages of competitive bidding, wherein the lowest bidder receives the award (Tr. 202–204, 293). The salt is delivered in bulk or bags, and is transported by railroad, truck, barge and boat.

Appellants' pricing policy, which each claimed to have adopted and followed independently of the other, is to "meet but not beat" competitors' prices (M. J.S. A–15, Tr. 2821–24, 3108–09, 2825–26, D. J.S. 10, M. J.S. 7; M. J.S. A–7–8, A–10). In its simplest form, this policy is implemented by quoting the f.o.b. mine price of the producer closest to the consumer plus the cost of delivery by rail from that producer (Tr. 753–754, 629, 643, 680, 1814–17, 1848–49, 1852, 1987). The producers farther from the purchaser—such as Dia-

mond, whose Louisiana mines are farther from the midwestern market than International's mine in Detroit, Michigan, or Morton's in Ojibway, Canada—absorb a part of their actual freight cost (Tr. 1651–53, 3011, M. J.S. 18). Sometimes the parties arrived at identical prices by employing rail freight rates in computing transportation cost even though the rock salt was actually shipped by truck, barge or boat (*e.g.*, Tr. 3022–39, 1030–36, 1082–93; M. J.S. A–15, where the finding refers to "artificial freight rates"), and in such instances the parties on occasion added a "truck premium" to the rail rate used in the formula (*e.g.*, Tr. 1082–89, 2464). There were also numerous telephone calls and personal meetings at which high executives exchanged general pricing information and information about specific bids (*e.g.*, Tr. 681, 689–90, 731–32, 795, 784–785, 1184, 1740, 1319–23, 1381–84, 1244–45, 1420–23, 1312–15, 1385–90, 1405–13, 1565–67, 1423–46, M. J.S. A–9, A–16).

### 3. THE DECISION OF THE DISTRICT COURT

The district court held that the government had proved an agreement to fix prices (M. J.S. A–11, A–16). It expressly acknowledged that identical bids do not necessarily prove conspiracy (M. J.S. A–11, A–9), but found in accordance with *Theatre Enterprises* v. *Paramount,* 346 U.S. 537, 540–541, that the "entire record as to collaboration among the parties and with the multitude of complete identities in the bids to the very penny" demonstrated "adherence to a plan adopted by consultation and conferences among the parties involved" (M. J.S. A–9).

It rejected the contention that any inference of violation was negated by the fact that, at times, appellants actively competed for business, finding that instances of competition did not negative the affirmative evidence that the parties agreed to fix the price of rock salt to the maximum extent that it was possible to do so (M. J.S. A–10, A–16—A–17).

## ARGUMENT

The district court correctly decided this case on the basis of established antitrust principles which have been repeatedly affirmed by this Court. The case presents no issue warranting plenary consideration, and the judgment of the district court should be affirmed.

1. Appellants argue that this case raises the question whether mere "conscious parallelism" violates the antitrust laws (M. J.S. 10–19; D. J.S. 9–16). No such question is in fact presented. The district court expressly stated that the facts showed "adherence to a plan adopted by consultation and conferences," including "conferences in meetings, by telephone, and otherwise, which were carried on by the parties in order to restore the understanding among the parties" (M. J.S. A–9). It deemed the rule of *Theatre Enterprises* v. *Paramount,* 346 U.S. 537, on which appellants rely, "particularly pertinent," and expressly found that the government had proved the "agreement [which] is a *sine qua non* of a price conspiracy" (M. J.S. A–11).

The district court's finding of conspiracy and collusion rested, we submit, upon ample evidence.

Against a highly suggestive background consisting of a "multitude of complete identities in the bids to the very penny" (M. J.S. A–9), including instances in which the added factor for rail freight was arbitrary because actual deliveries were made by truck, boat or barge (*supra,* p. 4), the proof showed telephone conversations and meetings among various employees of the companies involved at which they admittedly passed along information as to previous and future bids (*supra,* p. 4), and meetings at which prices were actually fixed. One such meeting (Tr. 1405–13, 1565–68), held at the Minneapolis Athletic Club in 1957, was attended by La Liberte, the President of Cutler, a Mr. Bergford of Cutler, Beattie, Morton's Special Assistant to the Vice President in Charge of Marketing, and Tonnemaker, Manager of Cargill's Salt Department. Beattie explained that prices on a pending invitation to bid for State of Wisconsin requirements were to be arrived at through the use of the normal pricing methods (Tr. 1409), and he showed previously prepared worksheets to Tonnemaker, who wrote down the delivered prices for locations with which he was concerned and later bid these prices. His bids were identical to Morton's—and also to International's (Tr. 1413, 1566–67). Indeed, Tonnemaker testified that "[i]f the people in the meeting had thought we were going to bid lower they wouldn't have given me the information. I felt it was fairly evident by virtue of my being there that we were going to bid the same price" (Tr. 1567).

On another occasion (Tr. 1425–46), Beattie told Tonnemaker that the latter would be called by Cutler (Tr.

1428). La Liberte of Cutler then called Tonnemaker to give him the pricing bases to be used in bidding to supply State of Indiana requirements. Tonnemaker wrote down this information and used it in preparing his bids. The night before the bidding opened, Mr. Smith, Manager of Diamond's Sales Service Department, called Tonnemaker because he was quite anxious to give pricing information to Tonnemaker.[2] The pricing information which Smith related was the same information that Tonnemaker had already received from La Liberte. The next day Tonnemaker bid according to the pricing bases received from La Liberte and Smith, except for two locations on which he cut the price. With the exception of these two locations, Tonnemaker's bids were the same as Morton's and International's (Tr. 1441–42).

As the foregoing examples illustrate, there was ample support for the district court's conclusion that this was a case not of mere "conscious parallelism," but of agreement to fix prices. Defendants sought to explain away the evidence; but the district court was free to reject their explanations. Since the court's findings were not clearly erroneous (Rule 52(a), Fed. Rules of Civ. Proc.), as appellants virtually concede

[2] The evidence also showed, among other things, that Smith of Diamond constantly discussed future bids with the Sales Operation Manager of Carey Salt (Tr. 795); that executives of Diamond and Cargill fixed the amount of the truck premium charged the State of Illinois in 1957 (Tr. 1386–90); and that, in accordance with a general understanding that Cutler would adopt Morton's prices (Tr. 1245), these two companies regularly conducted a complete interchange of information for the purpose of arriving at identical bids (Tr. 1279–80).

(D. J.S. 12, fn. 4; M. J.S. 17–18), its decision must stand. *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 394–95.[3]

2. Appellants argue that by virtue of the principle of *res judicata* and the Fifth Amendment's prohibition against double jeopardy, their acquittal by a jury in a prior criminal proceeding barred the present suit for injunction. There is no merit to this argument. This Court rejected the same *res judicata* argument in *United States* v. *Real Estate Boards*, 339 U.S. 485, where it expressly distinguished *Coffey* v. *United States*, 116 U.S. 436, the case upon which appellants rely. Appellants so acknowledge (M.J.S. 20; *id.*, fn. 8), and suggest no reason why this Court should reexamine its decision in *Real Estate Boards*. That case correctly held that Congress having provided the United States with both a penal and a civil remedy in antitrust cases, a jury's refusal to find guilt beyond a reasonable doubt in a criminal case does not foreclose a court from issuing an injunction in a civil

[3] Appellant Diamond suggests that this Court should apply a lesser standard to the findings of the court below because that court (1) did not hear the witnesses for the defense and therefore could not appraise their credibility (D.J.S. 12 and fn. 4), and (2) adopted the government's proposed findings rather than drafting its own *de novo* (D.J.S. 12 and fn 3, 14–16). As to (1), the appellants misread *Gypsum*, *supra*, which expresses a preference for contemporaneous writings over oral testimony but does not suggest that the "clearly erroneous" rule would not apply to a cause submitted on a written record by stipulation of the parties. As to (2), Judge Nordbye adopted the government's findings only after writing an opinion which clearly stated the basis of his decision, and after hearing defendants' objections to the government's proposed findings (Transcript of hearing of October 28, 1964, pp. 1–83).

suit, whose purpose is remedial, not punitive, and in which a lesser standard of proof is therefore appropriate.

Appellants' double jeopardy argument, in part based on the premise that this civil injunctive suit amounts to a second punitive action because it may open the way for treble damage actions by private parties, also is without merit. It is well established, first, that the purpose of civil antitrust suits such as this one, and the relief obtainable in them, are remedial, not punitive, *Real Estate Boards, supra,* at 493; *United States* v. *National Lead Co.,* 332 U.S. 319, 338, and, second, that a remedial civil action is not barred by the Fifth Amendment's prohibition against double jeopardy, *Helvering* v. *Mitchell,* 303 U.S. 391. That a subsequent treble damage action might be facilitated by findings made in the government's civil action does not change the essential character of the government suit.

## CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted.

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IN THE

# Supreme Court of the United States

No. 276

DIAMOND CRYSTAL SALT COMPANY,
Appellant,
v.
UNITED STATES OF AMERICA,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA
FOURTH DIVISION

## BRIEF OF DIAMOND CRYSTAL SALT COMPANY OPPOSING MOTION TO AFFIRM

At pages 3-4 of its Motion to Affirm the United States concedes that, due to the unfavorable location of Diamond's Louisiana mine, Diamond must "absorb a part of [its] actual freight cost" in making sales of de-icing rock salt to Midwest governmental agencies. This concession substantiates the primary factual premise underlying the second question presented in Diamond's Jurisdictional Statement, i.e., by virtue of the disadvantageous location of its Louisiana rock salt mine, Diamond had no alternative but

to attempt to "meet but not beat" the anticipated lowest bid.

Nonetheless, the United States contends that such question does not deserve plenary consideration by this Court. Its only argument in support of such contention, i.e., ample evidence exists to sustain the District Court's finding that Diamond agreed to adopt a restrictive de-icing rock salt pricing policy in concert with its competitors, is both specious and misleading.

First, the United States implies that Diamond's pricing policy is somehow "artificial" or "arbitrary" because Diamond on occasion employed "rail freight rates in computing transportation cost even though the rock salt was actually shipped by truck, barge or boat. * * " (pp. 4 and 6, Motion to Affirm).

The fact is that the practice of computing bids for truck deliveries by adding a so-called "truck premium" to the rail rate was initiated by the State of Illinois. In 1957 Illinois announced that it would give no consideration to bids for truck delivered rock salt "where the price per ton F.O.B. truck at destination is more than $1.50 per ton in excess of the price per ton F.O.B. rail cars to the same destination" (Tr. 1817-18). Obviously, this instruction forced suppliers to compute their truck bids on the basis of rail rates to which an increment, or premium, not exceeding the specified maximum could be added.

The use of a truck premium results in substantial savings to the purchaser because the supplier's actual cost of truck deliveries exceeds the rail rate plus the premium (Tr. 3046-3048). Once Illinois required suppliers to absorb such portion of their actual truck cost, the truck premium became widely utilized in computing truck delivered bids

(Tr. 2460). As competition forced reductions in the amount of the premium from $1.50 per ton to $1.00 per ton (Tr. 2340) and even less (Tr. 1881-82), the savings accruing to purchasers increased proportionally.

Moreover, if, as a condition to submitting a bid for truck deliveries, Diamond is required to truck its product the entire distance from Louisiana to the Midwest, Diamond would, due to the prohibitive truck rates that apply to such hauls, be forced to withdraw from competition therein. Stated differently, even though, to meet the anticipated lowest delivered price, Diamond's bids are on occasion computed on the basis of the actual truck rate from the closest competitive mine to the point of delivery, Diamond must utilize lower cost barge transportation from Louisiana to river ports within economical trucking distance of the ultimate point of delivery in order to net back at its Louisiana mine a return on its rock salt which exceeds its cost of production.

Therefore, unless the Government advocates a state of competition in which a supplier is required to realize the same f.o.b. mine return on all of its sales (which is only another way of arguing that freight absorption is unlawful), it is in no position to argue that Diamond's truck delivered bids to Midwest governmental agencies are "artificially" or "arbitrarily" computed.

In addition to the "artificial freight rate" argument the Motion to Affirm discusses in some detail three transcript references in support of its charge that Diamond participated in a price-fixing agreement: two involved conversations solely between Diamond and Cargill, Diamond's distributor; the third involved conversations that were not concerned with rock salt.

A. With respect to the Indiana conversation (p. 7, Motion to Affirm), the evidence is undisputed that the Manager of Diamond's Sales Service Department (who had no authority to approve a bid (Tr. 2100-02)) did nothing more than make a resale price suggestion to Diamond's distributor Cargill. Not only was such suggestion admittedly rejected in large part by Diamond's distributor, but that distributor—whose officials comprised the Government's key witnesses—repeatedly and unconditionally testified that throughout the indictment period Cargill independently developed its own pricing policy and unilaterally determined the amount of its bids (Tr. 1340, 1483).

B. With respect to the other Cargill conversation (Footnote 2, Motion to Affirm), the testimony of Cargill's Tonnemaker on pages 1388-99 of the Transcript and Diamond's Exhibit 10 make it clear that Diamond and its distributor submitted a joint truck bid to Illinois in 1957 because Cargill, which had a supply of rock salt in Illinois, was not a "known name" at that time and Diamond, whose name was "familiar", had no supply of rock salt there (Tr. 1388-89). How such joint bid from Diamond and its distributor, neither of whom could individually submit a truck bid to Illinois, tends to prove that Diamond adopted its de-icing rock salt pricing policy in concert with its competitors, the Government does not and cannot explain.

C. The Government would have this Court believe that the testimony to which it refers in Footnote 2 of its Motion to Affirm is that "Smith of Diamond constantly discussed future bids with the Sales Operation Manager of Cary Salt (Tr. 795)". This characterization does gross violence to the testimony appearing at page 795 of the Transcript. Moreover, the concluding statement of the Cary Salt witness is that his conversations with Diamond did not relate

to rock salt (Tr. 796), the only product involved in this action (Finding No. I; DJS 10a).

As the United States must concede, the Transcript is absolutely devoid of any evidence that Diamond *knew of, or participated in,* the incidents involving Cargill, Morton and Cutler-Magner, Morton's distributor, which are discussed at pages 6 and 7 of the Motion to Affirm.

Except as above noted, the Motion to Dismiss does not specifically analyze the Transcript as it relates to Diamond, even though the Government received one 30 day extension and, without permission, took an additional 3 days in which to file such Motion. Instead, the Government is content to make certain general references to the Transcript, many of which do not involve Diamond. Detailed analyses of those references which do pertain to Diamond would not only unduly lengthen this Brief but would serve no useful purpose since, to the extent they have not already been specifically discussed in this Brief or in Diamond's Jurisdictional Statement, they largely corroborate what has heretofore been said, namely, that Cargill's witnesses testified that Cargill ignored Diamond's resale price suggestions although the same were solicited by Cargill in its capacity as Diamond's distributor and that, due to the disfavored location of Diamond's mine, Diamond feared that lower delivered prices initiated by Diamond or Cargill would, through retaliation by International and Morton, force withdrawal of Diamond and Cargill from the Midwest snow and ice market.

## CONCLUSION

The concession contained in the Motion to Affirm that Diamond is required to absorb freight in making sales of de-icing rock salt to Midwest governmental agencies, when coupled with the speciousness of the Government's "artificial freight rate" argument and its unsupported assertions that Diamond agreed with its competitors to adopt its de-icing rock salt pricing policy, strengthens Diamond's contention that the second question raised by its appeal is substantial and of public importance. Probable jurisdiction of that question, as well as of the question jointly raised by Diamond and Morton, should be noted.

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September 8, 1965.